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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 599

PHOENIX TITLE & TRUST COMPANY, an Arizona corporation, now known as TRANSAMERICA TITLE INSURANCE COMPANY,

Petitioner,

vs.

EDNA (VAN-Y) MARKEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

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Petitioner,

vs.

EDNA (VAN-Y) MARKEL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARIZONA

Petitioner prays that a writ of certiorari issue to review that portion of the opinion[1] of the Supreme Court of Arizona which deprives petitioner of a trial or hearing upon conflicting claims and which directs entry of a money judgment against petitioner.

JURISDICTION

The opinion[1] of the Supreme Court of Arizona was entered on June 5, 1968. A Motion for Rehearing was timely filed; it was denied on July 9, 1968 (Appendix B). The Mandate of the Supreme Court of Arizona issued on July 15, 1968 (Appendix

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[1] *Markel v. Phoenix Title & Trust Company*, ____ Ariz. ____, 442 P.2d 97 (1968)—APPENDIX A, reversing *Markel v. Transamerica Title Insurance Company*, 6 Ariz. App. 585, 435 P.2d 714 (1968)—APPENDIX E.

C). A decision of the Arizona Supreme Court becomes effective and final upon the date of issuance of its mandate — in this case on July 15, 1968. *Borrow v. El Dorado Lodge*, 75 Ariz. 218, 220, 254 P.2d 1027, 1028 (1953). This Petition for Certiorari is docketed within ninety days thereafter. 28 U.S.C. § 2101(c) and 28 U.S.C. § 1257(3).

No Federal question existed in this case until the opinion of the Supreme Court of Arizona was rendered. The Federal question was timely raised in the first portion of petitioner's Motion for Rehearing before the Supreme Court of Arizona (Appendix D). The whole of the Motion for Rehearing was denied (Appendix B), as was our subsequent motion for Amendment of Mandate (Appendix B-1).

QUESTION PRESENTED

Can the highest court of a state, with impunity, render a decision on appeal which effectively and positively deprives petitioner of a trial or hearing (upon remand) on contested and unresolved issues which could well preclude any ultimate monetary liability; and does such a decision deprive petitioner of its property without due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment XIV, Sec. 1:

". . . No state shall . . . deprive any person of . . . property without due process of law; . . ."

U. S. Constitution, Amendment V:

"No person shall be . . . deprived of . . . property, without due process of law; . . ."

SPECIAL STATEMENT

The clearly unconstitutional portion of the opinion and Mandate of the Supreme Court of Arizona can be corrected by requiring the amendment of one paragraph of the Mandate (Appendix C). We respectfully submit that a Memorandum Opinion directing the partial modification of said Mandate to read as follows would be an appropriate disposition of this petition:

"The case is remanded to the Superior Court with directions THAT THE CLAIM OF PLAINTIFF AGAINST DEFENDANT VIRGINIA R. VAN-Y BE PROMPTLY HEARD AND DETERMINED, WITH FURTHER DIRECTIONS to enter judgment for plaintiff for $13,037.50 with interest on each of the above disbursements from its date AGAINST DEFENDANTS TRANSAMERICA AND VAN-Y IF PLAINTIFF PREVAILS AS AGAINST DEFENDANT VAN-Y." [Note: The solid capped material would be added to the existing wording of the Mandate.]

STATEMENT OF THE CASE

The basic claim of the respondent is that she is entitled to a one-half interest in the proceeds of the sale of certain land in Phoenix, Arizona. She bases her claim upon a 1939 divorce decree as between herself and Earl Van-Y, now deceased.

Respondent's former husband, Earl, thereafter married Virginia Van-Y, and by 1957 Virginia had secured full fee title to the land in question. In 1957, Virginia sold the land, and all the proceeds were collected and disbursed to Virginia by petitioner, both before and after this suit was commenced.

The legal theory upon which respondent's claim is grounded is that a constructive trust exists in her favor as against Virginia and petitioner. As far as respondent's specific claim against petitioner is concerned, she contends that one-half of the proceeds were wrongfully disbursed to Virginia by petitioner, and that petitioner is liable for such wrongful disbursements.

In a prior 1966 opinion[2] on appeal, the Supreme Court of Arizona remanded this case to the trial court for a new trial, with numerous references to the fact that Virginia's defense had never been presented. See Appendix F, particularly the emphasized portions at the beginning and at the end of the 1966 opinion (Appendix F). After remand, and before retrial, petitioner made a limited motion for summary judgment — which was granted by the trial court, affirmed by the Court of Appeals (Appendix E), and reversed in favor of respondent by the Supreme Court of Arizona (Appendix A).

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[2] *Markel v. Phoenix & Trust Company*, 100 Ariz. 53, 410 P.2d 662 (1966)—APPENDIX F.

Virginia was not a party to the limited 1968 appeal, and the retrial ordered in 1966 has been (and still is being) postponed by the trial court pending the determination of this appeal.

Profuse citations to the record relative to the foregoing summary of the case will be found in Appendix D.

We candidly concede that no Federal question was involved until the Supreme Court of Arizona rendered its 1968 decision (Appendix A). At that point, however, a direction was made for the entry of a money judgment against petitioner *without* any provision being made for a trial or hearing upon remand to determine the fact question of whether respondent's *claim* of a constructive trust was proper as against Virginia.

It goes without saying that if Virginia and petitioner, as the result of such trial, are able to prove that no constructive trust exists between Virginia and respondent, then petitioner's disbursements to Virginia would be completely justified. No money judgment against petitioner would be possible in that event.

Respondent's claim against Virginia is in exactly the same status as it was in 1966 (Appendix F). No trial on the *foundation liability* question has been held. Yet the 1968 decision (Appendix A) directs the entry of a final, enforceable judgment against petitioner — now! No opportunity for a trial or hearing is afforded petitioner. No opportunity is given for petitioner to defend.

This anomalous situation has resulted, in large part, because the Supreme Court of Arizona, on its own motion, and without request by respondent, took the liberty of granting summary judgment on appeal against petitioner — without any apparent understanding of the complete status of this lawsuit. The granting of summary judgment on appeal, on the court's own motion, has been denounced by this Court, with comments on the propensity of this procedure for compounding errors. *Fountain v. Filson*, 336 U.S. 681, 69 S.Ct. 754, 93 L.Ed. 971.

REASON FOR GRANTING THE WRIT

Notice, Hearing, and the Opportunity to Defend are Basic Constitutional Rights Provided by the Due Process Clause of the

Federal Constitution; This Protection Extends to Actions of State Courts Which are Violative of Due Process; and the Mandate Issued by the Supreme Court of Arizona Based Upon its Decision Must be Amended to Provide Petitioner With the Opportunity to be Heard and to Defend Before a Final Money Judgment Can be Entered Against Petitioner.

The direction of final judgment on appeal against petitioner deprives petitioner of due process of law in that petitioner has been arbitrarily denied its right to an adjudication of the primary liability question. Constitution of the United States, 5th and 14th Amendments thereto.

Notice, hearing, and the opportunity to defend are basic constitutional rights protected by the due process clause of the Federal Constitution. *Shelley v. Kraemer,* 334 U. S. 1, 16, 68 S.Ct. 836, 843, 92 L.Ed. 1161, 1182 — this protection extending as well to provide redress as to actions of state courts which are violative of due process. Compare *In re Central Railroad Co. of New Jersey,* 136 F.2d 633, 639, cert.den. *Pitney v. State of New Jersey,* 320 U.S. 805, 64 S.Ct. 437, 88 L.Ed. 486.

A statement of this principle, which applies with particular force as far as this case is concerned, is found in *Consolidated Gas Co. v. Mayer,* 146 F. 150, 152:

> "Every individual who feels himself aggrieved either by the action of some other individual or of the state or the nation is secured the right to bring his grievance before some court. It may be a court of law or equity, a court established by a statute or by a Constitution, a state Court or a federal court, but somewhere or other there is provided for him a forum to which he can present his case, can support it by proof, and have his hearing. That is 'due process of law,' a heritage from long centuries of struggle, which this nation and its constituent states have deposited in the corner stones of their written Constitutions. Everyone is entitled, sometime, somewhere, to his 'day in court.' The most swollen aggregation of capital, crystallized into an individual by the act of the state or national government which has made it a corporation, is as much entitled to have free access to the courts as is the humblest toiler by night to whom every additional cent, dis-

bursed by the light he works by, means a shrinkage of his food supplies."

The petitioner is an Arizona corporation. Corporations are, of course, extended the same guarantees under the due process clause as are individuals, particularly as far as property rights are concerned. See, e.g. *Grosjean v. American Press Co.*, 97 U.S. 233, 244, 56 S.Ct. 444, 447, 80 L.Ed. 660, 665-666.

By entering judgment on appeal against petitioner, when there has been no trial, no hearing, no presentation of any evidence, and no decision as to whether any primary liability exists, the Supreme Court of Arizona has, we respectfully submit, deprived petitioner of property without due process of law.

CONCLUSION

We respectfully submit that the Mandate of the Supreme Court of Arizona, based upon its decision, must be modified, perhaps in a Memorandum Opinion, to provide for a remand of this action for trial, with petitioner's monetary liability to abide the outcome of such a trial. We have suggested a proper modification of the Mandate at page 3 of this petition. For these reasons, therefore, this petition for the writ of certiorari should be granted.

Respectfully submitted,

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